No. 7753

# United States Circuit Court of Appeals

## For the Ninth Circuit

WALTER CHALAIRE,
*Appellant,*

vs.

CORNELL S. FRANKLIN,
*Appellee.*

## BRIEF FOR APPELLANT.

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## Memorandum In Opposition to Appellee's Motion to Affirm.

**(For Insertion in Brief for Appellant in Accordance with Order of Court Following Oral Argument.)**

The motion is without merit. The appeal is on the judgment roll and more specifically on the pleadings. There was no trial. Plaintiff and defendant each moved for judgment on the pleadings. Judgment was given for defendant and the appeal taken by the plaintiff.

On such an appeal, special findings of fact and conclusions of law, requests for rulings on points of law with exceptions thereto, and bills of exceptions are unnecessary. The errors are apparent on the judgment roll.

*Nalle v. Oyster,* 230 U. S. 165, 176-177; 57 L. Ed. 1439; 33 Sup. Ct. 1043;

*St. Paul M. & M. Ry. Co. v. Drake* (C. C. A. 9th), 72 Fed. 945, 947;

*Mitsui v. St. Paul F. & M. Ins. Co.* (C. C. A. 9th), 202 Fed 26, 28; Certiorari denied 231 U. S. 749; 34 Sup. Ct. 321; 58 L. Ed. 465.

Cases cited by appellee, such as

*Fleischman v. U. S.*, 270 U. S. 349;

*First Nat. Bk. of San Rafael v. Philippine Refining Corp.* (C. C. A. 9th), 51 Fed. (2d) 218;

and

*Pickering & Co. v. Chinese American Assn.* (C. C. A. 9th), 71 Fed. (2d) 895;

do not hold otherwise. Bills of exceptions, special findings, etc., were declared requisite in these cases because there had been trials and evidence or rulings in the course of the trials were sought to be reviewed. The cases expressly recognize that these formalities are not necessary where it is sought to review only "errors apparent from an inspection of the pleadings, process and judgment" [Judge Rudkin in *Wulfsohn v. Russo-Asiatic Bk.* (1926), 11 Fed. (2d) 715, where this court reviewed the statute of limitations as a question arising on the judgment roll (pleadings)].

No replication is required under the practice in the United States Court for China.

*American Trading Co. v. Steele* (C. C. A. 9th 1921), 274 Fed. 774, 781.

For the opinion of the court below (Judge Lobingier) see

*Steele v. American Trading Co.* (1920), 1 Extra-Territorial Cases 964, 972, 973.

See also Judge Lobingier's opinion to the same effect in

*Chiu v. Wagman* (1922), 2 Extra-Territorial Cases 360;

and

*Consular Court Regulations,* printed on p. 226 ff. in Hinckley's *American Consular Jurisdiction in the Orient.*

Respectfully submitted,

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WALTER CHALAIRE,
*Appellant,*

vs.

CORNELL S. FRANKLIN,
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## BRIEF FOR APPELLANT.

### I.

### *Statement of the Case.*

This is an appeal from a judgment of the United States Court for China, taken pursuant to Section 3 of the Act of June 30, 1906.*

The appellant, Chalaire, was the plaintiff in the court below. The appellee, Franklin, was the defendant. They are referred to in this brief as plaintiff and defendant.

The action was for breach of a written contract. Plaintiff and defendant had been partners in the practice of the law at Shanghai. Plaintiff was leaving to take a vaca-

*34 Stat. 814, U. S. Code Tit. 22, Sec. 194.

tion in the United States and this contract was made at Shanghai on the eve of his departure. The full text of the contract appears at page 12 of the transcript and is set out in the Analysis of the Pleadings in the next chapter of this brief. In substance the defendant undertook to pay plaintiff 50,000 Shanghai taels over a period of time as provided in the contract if plaintiff would forebear returning to China at the end of his holiday. Plaintiff did so forebear. Defendant paid only 2,225.88 taels of the 50,000 and refused to pay any more. The suit charges breach of contract and prays for the balance of 47,774.12 taels, with interest and costs.

The case was determined below and is presented to this court on the pleadings alone. Deeming that the answer admitted all material allegations of the complaint and set up no valid defense, the plaintiff moved for judgment on the pleadings. The defendant countered with an oral motion for judgment in his favor. The court granted the defendant's motion and dismissed the complaint upon the ground that the action was barred by "the three year period of the District of Columbia Code."

On this appeal by the plaintiff error is assigned not only to the judgment of dismissal entered on defendant's motion, but also to the failure of the court to grant plaintiff's motion for judgment in his favor on the pleadings. Hence if this court agrees with our contentions it will not only reverse the judgment below but in its mandate will direct the entry of judgment for plaintiff.

In essence the questions raised are:

(1) Was the court right in holding the action barred by the 3 year statute of the District of Columbia? It is

the position of the plaintiff: (a) that the District of Columbia Statute of Limitations has no application whatever to actions in the United States Court for China; (b) that the only limitations sanctioned by the statute which created that court are those prescribed by the Consular Court Regulations of 1864, which require an action on a written contract to be brought, as this action was, within six years from the time when the cause of action accrued; and (c) that the court below fell into error through misinterpretation of the decision rendered by this court in 1907, in

*Biddle v. United States,* No. 1463, 156 Fed. 759.

(2) If the Consular Court Regulations applied, and the action therefore was timely, was a cause of action for breach of contract sufficiently stated in the complaint and so far admitted in the answer as to require judgment for plaintiff on the pleadings? We so contend, and urge that none of the defenses set up in the answer is valid.

Before proceeding to the argument, and in order to show how these questions are raised, an analysis of the pleadings is in order.

## II.

### *Analysis of the Pleadings.*

The action was instituted by complaint filed February 1, 1934, to which an answer was duly filed by the defendant. This original complaint and answer were brought up as part of the record and appear in the transcript (Tr. pp. 2-11). But since they were displaced by amended complaint filed pursuant to stipulation, and answer thereto (Tr. pp. 11-18), the earlier pleadings are of importance only to show when the action was originally brought and that no new cause of action was introduced by the amendment.

Directing our attention now, therefore, to the amended complaint and the answer thereto, we find that the following facts alleged in the complaint have been admitted:

The plaintiff and the defendant engaged together as partners in the practice of law at Shanghai from May 1, 1924 to January 1, 1928, under an agreement whereby the profits of the partnership business were shared in the proportion of 60 per cent to the plaintiff and 40 per cent to the defendant. During the continuance of this partnership and on or about February 10, 1927, plaintiff Chalaire and defendant Franklin entered into the following written agreement, in the form of a letter from plaintiff to defendant:

"Shanghai, February 10, 1927.

C. S. Franklin, Esq.,
Shanghai.

Dear Cornell:

This will serve to confirm the arrangement which we made in connection with my impending departure.

I will take a vacation, ending on January 1, 1928, during which time I will continue to receive my share of the profits of the partnership and I presume I shall be liable as a partner for any partnership obligations during that period.

As you know, I may or I may not return to China; the matter is indefinite. If I return the matter is simple, we go on as we have before; if I do not, you are to pay me Tls. 50,000., to accrue as profits are made on and after January 1, 1928; 6/10ths of the profits to be paid to me until the sum of Tls. 50,000. has been paid, at which time the entire business shall be yours. I presume that although my interest in the profits shall continue until the sum above mentioned is paid after January 1, 1928, my liability shall cease at that time.

If the foregoing is in accordance with your understanding, please sign the same.

Faithfully yours,
WALTER CHALAIRE
C. S. FRANKLIN''

The plaintiff left on his contemplated vacation. During the month of November, 1927, plaintiff notified defendant that he had determined not to return to China and plaintiff has not since returned to China or practiced law there, but the defendant has continued to practice law in China up to the time of the institution of this suit.

It is conceded that the plaintiff received full payment of his 60 per cent share of the profits of the partnership during the period of plaintiff's vacation ending January 1, 1928, and 60% of the amount earned by defendant during the

further period from January 1 to March 31, 1928. The defendant admits having made as profit in the practice of law at Shanghai from April 1, 1928 to April 30, 1930, a sum of money 6/10ths of which is more than the sum of 47,774.12 Shanghai taels, the balance claimed by the plaintiff to be due him under the above agreement after deduction of payments (2,225.88 Shanghai taels) already made in respect of the period from January 1 to March 31, 1928.

Defendant alleges as his reason for paying plaintiff no share of the profits made after March 31, 1928, that he had agreed to share with the plaintiff the profits of the law practice or business carried on by the defendant "under the firm name and style of Chalaire & Franklin" until a total sum of 50,000 Shanghai taels had been paid, and that he had continued to pay the plaintiff his percentage so long as he practiced under that firm name, i. e., until March 31, 1928, when defendant ceased to practice under that name and abandoned the good will attaching thereto.

As separate defenses, the answer alleged:

1. That there was no consideration for the defendant's execution of the agreement sued on;

2. That if there was any legal consideration, an important part of it was plaintiff's promise to secure in the United States lucrative legal business and to send the same to the defendant in China, that plaintiff had failed to do so and that by reason thereof there was a failure of consideration for the defendant's undertakings contained in the agreement.

3. "That the Statute of Limitations has run against the claim hereby sued upon."

In this state of the record the plaintiff, pursuant to written notice, moved for judgment on the pleadings. This motion, as already noted, was countered at the time of hearing by an oral motion of the defendant for judgment in his favor. The court granted the latter motion and entered judgment for defendant upon the ground (as disclosed by the opinion, Tr. p. 20) that "plaintiff's cause of action accrued on or before April 20th, 1930," and was therefore barred by "the 3-year period of the District of Columbia Code" of 1901, i. e., by Sec. 1265 of "An Act to establish a code of law for the District of Columbia", approved Mar. 3, 1901, 31 Stat. 1189, 1389, incorporated in the 1930 edition of the Code as Sec. 341 of Title 24.

The errors which plaintiff asserts were committed by the court below and which he intends to urge on this appeal are set out separately and particularly as follows:

## III.

### *Specification of Errors.*

1. The court erred in holding that the limitation of actions in the United States Court for China is governed by Section 1265 of the District of Columbia Code of 1901, 31 Stat. 1389, which provides that no action shall be brought upon any simple contract, express or implied, after three years from the time when the right to maintain such action shall have accrued. Assignment 3.

2. The court erred in not holding that the limitation of actions in the United States Court for China is governed by Section 83 of the Consular Court Regulations for

China, promulgated April 23, 1864, and providing that civil actions based on written promise, contract or instrument must be commenced within six years after the cause of action accrues. Assignment 4.

3. The court erred in holding that plaintiff's cause of action accrued on or before April 20, 1930. Assignment 5.

4. The court erred in rendering judgment against the plaintiff on the pleadings. Assignment 7.

5. The court erred in not giving plaintiff judgment on the pleadings. Assignment 8.

As to the third point specified above (Assignment 5) no argument is necessary. It refers merely to a clerical or typographical error in the opinion (Tr. p. 20) which gives as the date of accrual of the cause of action April 20th, 1930, instead of April *30th,* 1930, the finding which must have been intended (Tr. pp. 14, 16). This error is specified only to avoid confusion. It is not material, for either April 20 or April 30, 1930, is more than 3 years and less than 6 years prior to February 1, 1934, when this action was filed. So, also, for that matter, is April 1, 1928, the earliest date when plaintiff's cause of action can possibly be thought to have accrued. There is therefore no need for argument as to the exact date when the cause of action did accrue. For the purposes of this appeal it is enough to say that it certainly accrued more than 3 and less than 6 years before this action was filed, and that whether or not it is barred depends upon whether the 3 year statute of the District of Columbia, or the 6 year limitation of the Consular Court Regulations should be applied. It is to this point, accordingly, that the first chapter of the argument is addressed.

## IV.

## *Brief of the Argument.*

### A. THE COURT BELOW ERRED IN DISMISSING THE COMPLAINT AS BARRED BY LIMITATION.

#### 1. THE TRIAL COURT WAS BOUND BY SECTION 5 OF ITS ORGANIC ACT TO APPLY THE SIX YEAR LIMITATION PRESCRIBED BY SECTION 83 OF THE CONSULAR COURT REGULATIONS OF 1864, UNDER WHICH THIS ACTION WAS FILED IN TIME.

The act of June 30, 1906, by which the court below was created, directed, in Section 5,

> "*That the procedure of the said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised States of the United States. . . .*"*
>
> (Act June 30, 1906, Sec. 5, 34 Stat. 814, 816.)

The only "procedure prescribed for the Consular Courts in China", and "existing" on June 30, 1906, was that contained in the Consular Court Regulations for China, promulgated by the ministers "in accordance with the Revised Statutes of the United States", Sections 4117, 4118 and 4119. The original text of the statutory authority is found in the Act of Congress of June 22, 1860, 12 Stat. 72, which provides:

> Section 5. "* * * That in order to organize and carry into effect the system of jurisprudence de-

*Italic emphasis throughout this brief is ours unless otherwise noted. Further provisions of the above section are quoted on page 17, *infra*.

manded by such treaties [granting rights of extra-territoriality to citizens of the United States in China, Japan and Siam] respectively, the said ministers, with the advice of the several consuls in each of the said countries, respectively, or so many of them as can be conveniently assembled, *shall prescribe the forms of all processes* which shall be issued by any of said consuls; *the mode of executing and the time of returning the same* * * * and, generally, without further enumeration, to make all such decrees and regulations from time to time, under the provisions of this act, as the exigency may demand; and all such regulations, decrees, and orders shall be plainly drawn up in writing, and submitted, as above provided, for the advice of the consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, who shall each signify his assent or dissent in writing, with his name subscribed thereto; and after taking such advice, and considering the same, the minister, in the said countries, respectively, may, nevertheless, by causing the decree, order or regulation to be published with his signature thereto, and the opinions of his advisers inscribed thereon, make it to become binding and obligatory, until annulled or modified by Congress; and it shall take effect from the publication or any subsequent day thereto named in the act."

Section 6. "* * * That all such regulations, orders, and decrees, shall, as speedily as may be after publication, be transmitted by the said ministers, with the opinions of their advisers, as drawn up by them severally, to the Secretary of State, to be laid before Congress for revision."

These provisions are now contained in Chapter 2, Sections 146, 147 and 148, of Title 22 of the United States Code, adopted by Congress June 30, 1926. Section 5 of the Act of 1906, above quoted, as incorporated in Section 196 of Chapter 3, Title 22 of the Code, now reads:

> "The procedure of the United States Court for China shall be in accordance, so far as practicable, with the *procedure prescribed* for consular courts in China *in accordance with chapter 2 of this title* * * *"

An examination of "Chapter 2 of this title" (Title 22) leaves no doubt that Congress could only have referred to the aforementioned Sections 146, 147 and 148 of that chapter, which are in effect the provisions of the Act of 1860 above quoted, whereby the ministers were authorized to prescribe procedure for the consular courts in China. It is the "procedure prescribed" by the ministers thereunder that Congress has directed the United States Court for China to follow. We therefore look to the acts of the ministers.

"In accordance with" his statutory authority Minister Anson Burlingame, on April 23, 1864, promulgated a set of regulations entitled, "Regulations for the consular courts of the United States of America in China." These regulations consist of 106 sections divided under eighteen chapter heads, all relating to different phases of procedure. They constitute, in effect, a short procedural code. The first chapter, for example, entitled "Ordinary Civil Proceedings", classifies civil actions, provides for service of process, default, attendance of witnesses, execu-

tions, costs, etc. Other chapters deal with tender, reference, habeas corpus, divorce, criminal proceedings, etc. Chapter XV is entitled "Limitation of Actions and Prosecutions". Its three sections are as follows:

> "82. *Criminal.*—Heinous offences not capital must be prosecuted within six years; minor offences within one.
>
> "83. *Civil.*—Civil actions, based on written promise, contract, or instrument, must be commenced within six years after the cause of action accrues; others within two.
>
> "84. *Absence; fraudulent concealment.*—In prosecutions for heinous offences not capital, and in civil cases involving more than $500, any absence of respondent or defendant for more than three months at a time from China shall be added to the limitation; and in civil cases involving more than $100, the period during which the cause of action may be fraudulently concealed by defendant shall likewise be added."

In further compliance with the statute, the regulations as drawn up by Minister Burlingame were circulated among "the several consuls" in China for their "advice", and each of them gave his express assent thereto as evidenced by their ten signatures following that of Mr. Burlingame. Thereafter, on November 1, 1864, the Minister caused the regulations thus adopted and approved to be published "with his signature thereto and the opinions of his advisers inscribed thereon". The notice of publication issued at the direction of the Minister by George F. Seward, Consul General at Shanghai, re-

cites that "under the provisions of the Act of Congress they become of binding force and effect from this date. Certified copies of the decrees have gone forward for simultaneous publication at the several ports".

All of the statutory conditions precedent having been complied with, the regulations then became, under the statute, "binding and obligatory until annulled or modified by Congress", and it was the duty of the Minister to transmit them for consideration by that body. This he did by letter to Secretary of State Seward, dated at Peking, November 9, 1864. Mr. Seward replied on March 27, 1865, acknowledging receipt of the Minister's letter "and its accompaniments, relative to the regulations by which you propose to conduct the proceedings in the consular courts of China. The subject", says Mr. Seward, "will be submitted to Congress at its next session". It was so submitted. This correspondence, including the text of the regulations, was "laid before Congress" by President Johnson at the time of his annual message, December 4, 1865. It appears on pages 413 to 421 of Part II of *"Message of the President of the United States, and accompanying documents, to the two Houses of Congress, at the commencement of the first session of the Thirty-ninth Congress"*, being the second part (separately paged and bound) of Volume 1 of *"Executive Documents printed by order of the House of Representatives during the first session of the Thirty-ninth Congress,* in sixteen volumes, Washington, Government Printing Office, 1866", which may be briefly cited as Ho. Ex. Doc. Vol. I, No. 1, part 2, 39th Cong., 1st Sess., pp. 413-421. The text of the regulations will be found conveniently reprinted in Hinckley,

*American Consular Jurisdiction in the Orient,* 1906, pp. 226-235.

No action was ever taken by Congress to revise, annul or modify these regulations, although several years later they were again brought specifically to the attention of that body by a letter of the Secretary of State to the Chairman of the Senate Committee on Foreign Relations, Senate Misc. Doc. No. 89, Vol. I, 47th Cong., 1st Sess., pp. 1, 9-10. The text of the "Regulations in force in the Consular Courts of the United States in China" was again printed as an appendix thereto. *Ibid.,* Appendix VII, pp. 69, 75. The Secretary submitted a "Draft of Proposed Act" to prescribe uniform regulations for the exercise of the extraterritorial judicial jurisdiction. The proposed act provided for a whole system of extraterritorial courts in the Orient and prescribed uniform rules of procedure therefor, including, it is interesting to note, a six year statute of limitations for both contract and tort actions. *Ibid.,* Appendix XIV, pp. 210, 224-225. Again no action was taken by Congress. Accordingly, it must be presumed that Congress was satisfied with the Regulations as drawn up by Minister Burlingame, and that it approved them in their entirety. The principle is the same as that applied by the Supreme Court in a case involving certain laws of a territorial legislature,

> *Clinton v. Englebrecht,* 13 Wall. 434, 446, 20 L. ed. 659 (1872):
>
> "In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book

> for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

The Consular Court Regulations of 1864, therefore, continued, with the tacit approval of Congress, "binding and obligatory", as they had been from the date of their publication. In other words, they had the force of law, for to this extent the minister had been given the power to *legislate* for citizens of the United States in China. Such was the opinion rendered with regard to similar provisions of an earlier statute by Attorney General Caleb Cushing, who, in 1844, as envoy, had negotiated our first treaty with China.

> *United States Judicial Authority in China,* 7 Op. Att'y Gen. 495, 504-505 (1855).

These Consular Court Regulations of 1864, as briefly supplemented by Ministers Angell and Denby, in 1881 and 1897,

> Hinckley, *American Consular Jurisdiction in the Orient* (1906), Appendix pp. 235-236,

were thus plainly "the existing procedure prescribed for consular courts in China" which the statute of 1906 that created the court below directed it to follow, "so far as practicable".

No reason is apparent, and none is suggested by the court below (Tr. pp. 21-22), why the limitation provisions of sections 83 and 84 of the Regulations are not "practicable" of application in the U. S. Court for China. They are succinct, definite and complete, and presumably best suited to conditions prevailing in China. So far as the limitation of 6 years for actions on written contracts is concerned, it is found "practicable" and appropriate in more than half the states of the Union. 37 states and territories allow 6 years or more, as against 14 which allow less than 6 years. Only three states, in addition to the District of Columbia, restrict the time to sue on a written contract to as little as three years.

See

2 *Wood on Limitations,* 4th ed. Appendix.

The various derogatory remarks of the court below, regarding the character of the Consular Court Regulations, are all beside the point. The description, "obsolete procedural equipment" (Tr. p. 21), certainly is not applicable to the limitation provisions of the Regulations and these are the only provisions with which we are concerned in this case. If it be true as the court says that they "apply only to actions at law and not to suits in equity" (Tr. p. 20) they are sufficient for this case which *is* an action at law.

It is of no purpose to speculate as to how far the Regulations may be supplanted by procedural rules for cases at law, which the Supreme Court may prescribe under its recent statutory authority (Tr. pp. 22-23).

No such rules have been issued, and if and when issued they will certainly not be retroactive as to bars by limitation even if they cover limitation of actions (which is doubtful) and even if they apply to the United States Court for China (which is also doubtful). The Statute says the rules are to be made "for the District Courts of the United States and for the Courts of the District of Columbia" (Act June 19, 1934; 48 Stat. 1064; U. S. Code Title 28, Sec. 723b).

The suggestion of Secretary of State Bayard, quoted in Hinckley, *op. cit.*, p. 55, footnote, and repeated by the court below (Tr. p. 21), that the consular regulation as to limitation of actions is to be regarded not as a "statutory mandate", but as a "rule of court", which "could be varied as justice might require", is contrary to the opinion of Attorney General Cushing and to the obvious purport of the Statute of 1860 which authorized and the Statute of 1906 which ratified the regulations.

It is true that an express proviso of Section 5 of the 1906 Act gives "the judge of the said United States court for China * * * authority from time to time to modify and supplement said rules of procedure" (Act June 30, 1906, 34 Stat. 814, Sec. 5; cf. U. S. Code Tit. 22, Sec. 196), but it would be contrary to the fundamental principles of our jurisprudence to conclude that this authorized the judge to make law to fit each case, according to his whim. With all due respect to the Trial Judge, we submit that no such autocratic power has been conferred on the judges of the United States Court for China. The extraordinary legislative power that they inherited from the

ministers must be held limited by the fundamental requirement of justice that laws shall be made known before they become binding, so that people may regulate their affairs accordingly. As Jeremy Bentham said,

> "We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of."

5 Bentham, *Works* (1843), p. 547;

Griswold, *Government in Ignorance of The Law,* 48 Harv. Law Rev., 198 (1934).

Cf. *Panama Refining Co. v. Ryan,* 293 U. S. 388, 55 Sup. Ct. 241, 245, 254, 79 L. ed. (Adv. op.) 223, 227, 239 (1935).

If the Trial Judge feels that the administration of justice in his court will be improved by cutting down the period of limitation for actions on written contracts from six years to three, he might, perhaps, by an appropriate order, "modify * * * said rules of procedure" accordingly. But the order certainly must be a general one, publicly announced, and should allow a reasonable time for enforcing rights of action which have accrued previously and are not barred by the existing regulations.

*Wheeler v. Jackson,* 137 U. S. 245, 255, 34 L. ed. 659, 11 Sup. Ct. 76 (1890);

*Lamb v. Powder River Live Stock Co.,* 132 Fed. 434 (C. C. A. 8th, 1904, per Van Devanter, J.)

No such order had been made by any judge of the United States Court for China prior to the decision of this case,

and Chapter XV, Section 83, of the Consular Court Regulations was therefore the law of the forum, which the Trial Judge was bound to follow as all of his predecessors had done. Thus Judge Thayer said in

> *Bennett v. Brooks,* 1 Extraterr. Cas. 220, 222 (1910),
>
> "The procedure of this court is regulated by the organic act, which provides that it shall be in accordance, so far as practicable, with the then existing procedure of American Consular Courts in China which is prescribed in the Court Regulations. * * * The same section of the creating act gives to the judge of the court authority to amend and supplement said rules *but the rules cited remain as they stood at the time when the act was passed.*"

The ruling of the court below in this case disregards a long line of decisions following the precedent established by Judge Thayer in the leading case of

> *U. S. v. Engelbracht,* 1 Extraterr. Cas. 169, 172 174 (1909).

This was a prosecution for embezzlement. The accused filed a plea to the effect that the action was barred by the lapse of the three-year period of limitation prescribed by R. S. Sec. 1044 (U. S. Code, Tit. 18, Sec. 582). The court overruled the plea, holding that the applicable period of limitation was that of six years prescribed by Section 82 of the Consular Court Regulations. Judge Thayer's opinion contains a sound and admirable analysis and discussion of the matter here in controversy. Only the length of the opinion and its ready accessibility in the reports of Extra-

territorial Cases deter us from reprinting the full text rather than selected passages in this brief.

Construing the organic act of 1906, Judge Thayer said in part:

> "Section 5 relates to the procedure of the court and provides that it shall be 'in accordance, so far as practicable, with the existing procedure prescribed for Consular Courts in China in accordance with the Revised Statutes of the United States,' the Judge being given power to modify and supplement the said rules. It is obvious that the particular Revised Statutes to which reference is made are those sections which we have already recited, contained in Title XLVII in pursuance of which the then existing procedure had been adopted. The words, 'in accordance with' are merely descriptive and not words of limitation.
>
> "In other words the procedure of the Court which this statute provides is found in the existing Consular Court Regulations. The statute does not state that only such regulations shall be binding as the Court may find to have been made in harmony with the Revised Statutes of the United States. It could have done so very easily by the use of appropriate words. As the statute stands it is not rationally open to any other construction than that announced. The phrase 'prescribed for Consular Courts in China in accordance with the Revised Statutes of the United States' is purely and simply descriptive.
>
> "All the existing Regulations had been laid before Congress, as required by law, many years before this statute was passed, and it must be presumed,

under well established doctrine,* that Congress had full knowledge thereof. In fact it appears to the Court that the provision referred to cannot be considered as anything less than an affirmative recognition and confirmation of such of these regulations, at least, as relate to procedure. Whether or not the act must be considered as recognizing and confirming the whole body of these regulations existing at the date of the passage of this act the Court does not at this time undertake to say. It is proper to note, however, that Congress had this opportunity to annul or modify any of these regulations but did not. Whatever objections may have been theretofore made to these regulations, based on a denial of the constitutional authority of Congress to delegate its legislative powers, it seems clear to the Court that the present action of Congress, in respect to such then existing regulations as relate to procedure of the Consular Courts, operates not only as a confirmation thereof but practically as an enactment of such regulations, exactly the same as if they had been verbally recited in the act itself. However much their origin may be assailed, the regulations adopted under Section 4117 are now clearly and unquestionably made binding and obligatory on this Court by direct and specific enactment. If Section 1044 of the Revised Statutes had theretofore any application in the Consular Courts of China, it has no force as a rule of procedure in the United States Court for China, because Congress has provided otherwise in the act creating the Court. Rule 82 of the Consular Court Regulations is made the law of this jurisdiction respecting the limitation of criminal prosecutions."

*Clinton v. Englebrecht,* 13 Wall. (U. S.) 434, 20 L. ed. 659.

Judge Thayer's holding was approved by Judge Lobingier.

*Everett v. Swayne,* 1 Extraterr. Cas. 867, 868 (1919), aff'd on another point by this court, 255 Fed. 71;

*U. S. v. Furbush,* 2 Extraterr. Cas. 74, 86 (1921).

Cf.

*Weil v. Wright,* 2 Extraterr. Cas. 395, 396 (1921);

*Fischer v. Stone,* 2 Extraterr. Cas. 595, 605, 606 (1923).

The same conclusion was announced as recently as 1933 by Judge Purdy, the immediate predecessor of the present incumbent. We refer to

*G. H. Sun & W. D. Mi v. The American Oriental Banking Corp.,* Cause No. 3520, Civil No. 1587, Decision and Judgment filed Oct. 5, 1933.

As the case has not yet been reported we have procured and filed with the clerk of this court a certified copy of Judge Purdy's Decision and Judgment. It will be observed that in that case as in this it was urged that an action upon a written contract was barred by the 3 year statute of the District of Columbia, but Judge Purdy held that the 6 year period of Sec. 83 of the Consular Court Regulations was controlling. We quote from the opinion (pages 10 and 11 of the certified copy on file with this court):

> "Of course Congress has the undoubted right to prescribe whatever limitations it may deem proper with respect to both civil and criminal actions cognizable in the United States Court for China, but it

seems to me that Congress never intended to provide limitations of action in the United States Court for China by such a roundabout and indirect manner as through the instrumentality of the Code of the District of Columbia.

"The Consular Court Regulations with respect to the limitation of actions were in force and operation in the American Consular Courts in China for more than thirty years prior to the establishment of the United States Court for China. Such Rules and Regulations were admittedly suitable and proper when framed and promulgated by Minister Burlingame in 1864. At that time there was no general law of the United States, nor is there one now prescribing periods of limitation for the prosecution of civil actions between private parties. It was therefore appropriate, if not absolutely necessary, that some such rule as the one in question be prescribed and included in the Consular Court Regulations which were published by the Minister. Again, these Rules and Regulations seem to me to have been in effect ratified and approved by Congress. They were published and promulgated by the Minister under authority conferred upon him by Sec. 4117 of the Revised Statutes, and they were required by Sec. 4119 of the Revised Statutes to be transmitted to the Secretary of State and by him laid before Congress for annulment or modification. (R. S.—Sec. 4118/19) And if we now turn to the provisions of the act of Congress establishing the United States Court for China we find the following:

> 'The procedure of the United States Court for China shall be in accordance, so far as practical, with the procedure prescribed for Consular

> Courts in China in accordance with Chapter 2 of this Title.'
>
> That is to say, in accordance with Sec. 4117 of the Revised Statutes (22 U. S. C. A.—Sec. 146) which was the very provision of law under and pursuant to which Minister Burlingame in 1864 adopted and published the Consular Court Regulations for China.
>
> "Taking all these matters into consideration I am satisfied that the limitation of six years contained in the Consular Court Regulations for China is the law of this jurisdiction with respect to the period within which a civil action on a contract may be prosecuted. I therefore hold that this action has not been barred by the Statute of Limitations as claimed by the defendant."

This Court itself has construed and applied this very section 83 of the Consular Court Regulations in a cause brought up from the United States Court for China, in 1926,

> *Wulfsohn v. Russo-Asiatic Bank,* 11 F. (2d) 715, 717 (C. C. A. 9th, No. 4343).

The action was for breach of certain exchange contracts and one of the questions raised on the appeal was whether the suit, which had been filed about three years after the breach, was barred by limitation. This court said that the defense of limitation had been waived by failure to plead it in the answer, but held, as a further ground for the decision, that the action was one upon written contracts and therefore within the six year rather than the two year provision of *"regulation 83 for the United States Consular Courts in China".*

2. THERE IS NO AUTHORITY FOR THE TRIAL COURT'S APPLICATION OF THE THREE YEAR STATUTE OF THE DISTRICT OF COLUMBIA CODE. THE CASE OF BIDDLE v. UNITED STATES ON WHICH THE TRIAL COURT MAINLY RELIED IS NOT IN POINT.

As authority for its adoption of the District of Columbia statute of limitations the court below relies upon the decision of this court in

> *Biddle v. United States,* No. 1463, 156 Fed. 759, 762-763 (C. C. A. 9th, 1907), reversing 1 Extraterr. Cas. 84.

That case is not in point. The question there raised was not, as here, a question of procedure which Section 5 of the act of 1906 provides for by adopting the Consular Court Regulations. The case did not involve any question of procedure, and Section 5 was not even mentioned by the court. The decision dealt only with matters of substantive law, governed by Section 4 of the act of 1906 and the corresponding section of the act of 1860, which direct the United States Court for China to apply "the laws of the United States" and in cases where those laws are inappropriate or deficient, the common law, including equity and admiralty, and "the law as established by the decisions of the courts of the United States".

> Act June 30, 1906, 34 Stat. 814, U. S. Code Tit. 22, Sec. 195; Act June 22, 1860, 12 Stat. 72, R. S. Sec. 4086, U. S. Code Tit. 22, Sec. 145.

In the *Biddle* case the appellant was contending that his conviction for obtaining money under false pretenses was not justified because that method of doing business

was no crime at common law and was not made such by any "law of the United States". The China Court had held that the British Statute of 1757 which first made it a crime to obtain money by false pretenses had been adopted as part of the common law of this country, and that it was therefore applicable to American citizens in China as, in the China Court's view, the laws of the United States did not cover the subject.

This court agreed that the obtaining of money under false pretenses could properly be regarded as a crime by the common law, but said that it was not necessary to rest the decision on that ground alone, for such an act is also a crime under the laws of the United States. The court held that "laws of the United States", within the meaning of Section 4 of the statute, included not only general statutes applicable throughout the country, but also legislation enacted especially for some particular territory "over which the United States exercise exclusive legislative jurisdiction". Referring then to the Alaska Criminal Code of 1899 and the District of Columbia Code of 1901, the court found that these both made obtaining money under false pretenses a crime against the United States. Such also was the effect of the act of July 7, 1898, 30 Stat. 717, Sec. 2, under which any act committed in federal military reservations or the like, within a state, if criminal by the law of the state, is also a crime against the United States. For obtaining money under false pretenses is a crime by the laws of nearly every state of the Union. The court summed the matter up thus:

> "In view of the legislation of Congress to which we have referred (the acts relating to Alaska and

> the District of Columbia, and the statute of July 7, 1898), our conclusion is that obtaining money or goods under false pretenses is an offense against the laws of the United States, within the meaning of the statute conferring jurisdiction upon the United States Court for China, and that an American citizen guilty of the commission of such an act in China is subject to trial and punishment therefor by that court." (156 Fed. 759, 763.)

The judgment of conviction in the *Biddle* case was reversed; because, however, facts sufficient to constitute the crime charged had neither been alleged nor proved.

It is not necessary, and we will not attempt, to state the exact extent and limits of the rule of the *Biddle* case, under which certain statutes enacted by Congress for limited areas under its exclusive jurisdiction such as Alaska and the District of Columbia may be applied by the United States Court for China. It seems enough to say that this court cannot have intended by its decision in the *Biddle* case to authorize the China Court to apply Alaska or District of Columbia statutes except in cases otherwise unprovided for by legislation. A general law of the United States would certainly take precedence over such a statute, as held by Judge Lobingier in

*Ezra v. Merriman,* 1 Extraterr. Cas. 809 (1918).

*A fortiori,* if a matter is covered by legislation enacted *expressly* for the United States jurisdiction in China, there is no occasion for looking to the District of Columbia or Alaska laws for provisions that may be conflicting. Such is the situation in this case. For as we have shown, the matter of procedure in the China Court, including

limitation of actions, is specifically provided for in Section 5 of the organic act by the ratification and adoption of the existing Consular Court Regulations.

Section 4, under which the *Biddle* case was decided, cannot be construed to authorize the nullification of section 5. When the two sections are considered together it is obvious that so far as the matter of procedure is covered by Section 5 and the Regulations referred to therein, it is outside the scope of Section 4 and therefore unaffected by other laws of the United States whether general or special. We believe it must be said here as in *U. S. v. Engelbracht,* 1 Extraterr. Cas. 169 (1909), that *"There is nothing in section 4 of the act which touches directly the question here presented. Section 5 relates to the procedure of the Court. * * *"*

Another illustrative case is

*U. S. v. Furbush,* 2 Extraterr. Cas. 74, 84-86, (1921).

In this prosecution for murder it was contended that the accused was entitled to a jury trial under the laws of Alaska and the District of Columbia, which, counsel said, had been "extended to American citizens residing in * * * China" by the decision of this court in the *Biddle* case. Judge Lobingier pointed out that

> "Of course the 'Biddle Case' extended nothing. Laws are not extended by judicial decision. * * * All that the Court of Appeals did in 'the Biddle Case' was to recognize and apply the legislative extension effected nearly sixty years before. It, indeed, impliedly treated certain acts of Congress, tho passed

for the District of Columbia and Alaska, as 'laws of the United States;' but that was merely the natural interpretation of the phraseology used in the extending act. * * *

"There are, of course, certain 'laws of the United States' which provide for jury trials; but they have never been extended to China. In their place Congress enacted other laws governing procedure in extraterritorial countries and the jury feature was invariably omitted. 'Any consul when sitting alone' was given criminal jurisdiction of ordinary cases tho provision was also made for 'associates' and upon the Minister jurisdiction of capital offenses was conferred. This was the legislation which the famous 'Ross case'* construed and upheld, and it was this jurisdiction 'exercised by United States Consuls and Ministers' which was transferred to this court upon its organization.

"*The rules governing trials, however, are a branch of procedure* and the organic act of this court further provided

" 'That the procedure of said court shall be in accordance, so far as practicable, with the existing procedure prescribed for Consular courts in China in accordance with the Revised Statutes of the United States.'

"In other words the very provisions construed in the Ross Case were, by this section, continued in

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**Ross v. McIntyre*, 140 U. S. 453, 35 L. ed. 581 (1891), in which the Supreme Court held that a trial and conviction for murder in a consular court, duly held and conducted "in accordance with court regulations" was not subject to collateral attack for violation of the constitutional guarantees as to indictment and jury trial, because these "apply only to citizens and others within the United States * * * and not to residents or temporary sojourners abroad."

> force as to this court and it is idle to argue that the Ross case is not in point because the court had not then been established. Moreover, the legislation above referred to gave the Minister power, which he exercised, to frame additional *regulations governing procedure,* and these, which exclude the jury, *are* likewise *continued in force by the organic act.*"

What the court below failed to appreciate is that the question of limitation, as a matter of procedure, is governed solely by section 5 of the organic act and by the Consular Court Regulations thereby adopted and "continued in force". Such matters are not within the province of Section 4 so as to justify the application of Alaska or District of Columbia statutes under the decision of this court in the *Biddle* case, which was based on a construction of Section 4.

Section 5 and the Regulations cover the case specifically and completely, and leave no gap to be filled by District of Columbia statutes under the rule of the *Biddle* case and its construction of Section 4. But wholly apart from Section 5, and assuming, for purposes of argument and contrary to fact, that there is no Section 5 in the statute, and the matter is to be governed by Section 4, i. e., by "the laws of the United States", as that term is construed in the *Biddle* case, we can see no possible reason for applying the 3-year statute of the District of Columbia Code* in preference to the Alaska statutes,** also mentioned in the *Biddle* case, and which allow *6 years*

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*Act Mar. 3, 1901, 31 Stat. 1189, 1389, c. 854, Sec. 1265; Code of 1930, p. 339, Tit. 24, c. 12, Sec. 341.

**Act June 6, 1900, 31 Stat. 321, 334, c. 786, Tit. 2, Sec. 6; Comp. Laws of Alaska, 1913, p. 381, Sec. 838.

for the commencement of such an action. We submit that neither the Act of 1906 nor the decision of this court in the *Biddle* case suggests the slightest reason for applying the District of Columbia law rather than the Alaska law in this case.

The organic act makes no reference to either. Section 4 simply refers to "laws of the United States now in force in reference to the American Consular Courts in China". That takes us back to the Act of June 22, 1860, Section 4 of which directs that the "laws of the United States" be applied, while Section 5 provides that the procedure shall be in accordance with the Minister's regulations. This court, in the *Biddle* case, held that "laws of the United States", within the meaning of Section 4 of the 1860 act might include the criminal laws enacted by Congress for Alaska and for the District of Columbia as well as the criminal laws of any state adopted by the Statute of July 7, 1898, with regard to crimes committed on federal military reservations, etc., within the states. In the *Biddle* case it was not necessary to make any choice among the available statutes, for they were substantially the same as to the matter there in controversy, and the court did not indicate any basis for choice among them.

No more does the court below indicate why it selected the District of Columbia statute, which would bar the plaintiff's action, rather than the Alaska statute or one of the great majority of state statutes that would not. In point of law there was no reason. The Trial Judge's decision to apply the shorter statute can only be regarded as arbitrary, for there is not an iota of legal principle or reasoning to tip the scales toward that side. Our juris-

prudence does not sanction such fortuitous judicial action; it requires that every decision be based on principle and legal reasoning sufficient to sustain it.

See

Cardozo, *The Nature of the Judicial Process* (1925), pp. 138-141.

There is of course no need in this case to attempt a solution of the dilemma in which the court below became entangled. The whole difficulty was occasioned by the court's failure to regard the provisions of Section 5 of the organic act. That section supplies the premises that make the conclusion as plain as A, B, C. It says clearly that matters of procedure shall be governed by the Consular Court Regulations, and Section 83 of those regulations says that the period of limitation for actions on written contracts shall be six years. This *is* an action on a written contract. Therefore the plaintiff had six years within which to bring his suit. His cause of action accrued, we submit, on April 30, 1930—certainly not earlier than April 1, 1928, and his action was filed Feb. 1, 1934, less than six years thereafter. Therefore the action was not barred by limitation and the court's judgment of dismissal was erroneous.

## B. THE COURT BELOW ERRED IN NOT GRANTING THE PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS.

### 1. THE ALLEGATIONS OF THE COMPLAINT AND THE ADMISSIONS OF THE ANSWER ESTABLISH A COMPLETE CAUSE OF ACTION FOR BREACH OF CONTRACT AND FIX THE AMOUNT OF THE DAMAGES.

It stands alleged and admitted that the defendant agreed in writing that if plaintiff did not return to China at the conclusion of his vacation, January 1, 1928, defendant would pay plaintiff 50,000 taels, to accrue as profits were made by defendant after that time, 6/10ths of such profits to be paid to plaintiff until the total sum of 50,000 taels had been paid, after which the entire business should be defendant's. That the partnership relation should nevertheless terminate January 1, 1928, in the event plaintiff did not return, is clearly indicated by the provision that although plaintiff's "interest in the profits" should continue until he was paid in full, his liability should cease "at that time", i. e., January 1, 1928.

Concededly plaintiff did not return to China. Defendant paid under the contract only 2,225.88 taels, representing 6/10ths of his profits from January 1, 1928, to March 31, 1928, inclusive. The balance, 47,774.12 taels, remains unpaid, although defendant admits that 6/10ths of his profits from April 1, 1928, to April 30, 1930, amounted to more than that sum. Clearly, therefore, if plaintiff has a cause of action, his damages are fixed in the amount of 47,774.12 taels, with interest thereon (as claimed) from April 30, 1930.

We submit that these admitted facts disclose a valid contract and a cause of action for its breach.

The four defenses set up by the answer—performance, lack of consideration, failure of consideration and limitation—are all demonstrably bad on the face of the pleadings.

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2. NO VALID DEFENSE ON THE MERITS IS SET UP IN THE ANSWER.

a. **The plea of performance depends upon allegations excluded by the parol evidence rule.**

The allegations of paragraph 3 of the answer amount to a plea of performance. After having admitted, in paragraph 1 of the answer, the execution of the written agreement set out in full in the complaint, the defendant proceeds, in paragraph 3 of the answer, to restate the agreement in different terms, so as to make the continuance of payment conditional upon continued use of the firm name of Chalaire & Franklin. It is then pleaded that payment was continued until March 31, 1928, "when the defendant ceased the practice of law under the firm name and style of Chalaire & Franklin and abandoned the goodwill attaching" thereto.

The written agreement pleaded in the complaint and admitted in paragraph 1 of the answer says nothing about the use of the firm name, and the absence of provision to the contrary leaves the implication that no right was given to the defendant Franklin to use the plaintiff's name at all after the termination of the partnership relation on January 1, 1928.

"In the absence of agreement providing therefor, the partners remaining after one of them has retired are not entitled to the continued use of the old name. Nor do the continuing partners secure that right by virtue of the conveyance to them by the retiring partner of all his right, title, and interest in the partnership business, property or assets, or even the good will where it rests upon the personal attributes of the partners."

47 *C. J.* 1022.

The provision that plaintiff's liability should cease January 1, 1928, is likewise inconsistent with any implication that the defendant might use plaintiff's name after that time. In

*Morgan v. Schuyler,* 79 N. Y. 490, 494 (1880),

the court said:

"* * * no case holds that the good will included the right to a continued use of the name of the firm. Indeed in such a case, the retiring partner would have given up the advantages, but remained liable to the risks and burdens of business, for *if his name continued upon the signs or other advertisements of the firm he would be bound to every one who gave credit thereto, in ignorance of the real state of the case, and liable for all debts contracted in the firm name.*"

This decision was followed in

*Blumenthal v. Strauss,* 6 N. Y. S. 393, 394 (1889),

in which the court said:

"* * * It will have been observed that nothing in the transfer in its whole scope grants in any form

> the right of using the plaintiff's name, or the right to declare themselves the successors of the old firm. * * * There is nothing in the facts and circumstances, duly and closely considered, which justifies the conclusion that by the agreement of dissolution the plaintiff designed to grant, or that the defendants expected to acquire by it, the right to assert that they were the successors to the business of the old firm, or of the members of the old firm; and *in the absence of* such *an agreement,* express or implied, *there is no right so to employ the name of one of the partners on dissolution,* or so to assert in reference to the whole business, since the decision of the court of appeals in *Morgan v. Schuyler,* 79 N. Y. 490, a decision which has not been questioned."

If the contract granted no right to the defendant to use plaintiff's name at all, then the contention that payment was conditioned on continued use of that name must fall. Indeed, all the allegations of paragraph 3 of the answer purporting to state the agreement between the parties in terms varying from those of the written contract admitted in paragraph 1, are rendered nugatory by the parol evidence rule.

> "* * * The principle is, that while parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms."
>
> *DeWitt v. Berry,* 134 U. S. 306, 312, 33 L. ed. 896, 899, 10 Sup. Ct. 536 (1899)

Strictly speaking, it is not a rule of evidence at all, or even one of interpretation.

"It is a rule of substantive law which, when applicable, defines the limits of a contract."

II *Williston on Contracts,* Sec. 631, p. 1221;

V *Wigmore on Evidence* (2d Ed.), Sec. 2400, p. 236.

"* * * The writing is the contractual act, of which that which is extrinsic, whether resting in parol or in other writings, forms no part."

*Pitcairn v. Philip Hiss Co.*, 125 Fed. 110, 113, (C. C. A. 3d, 1903).

It follows as a corollary that in rendering judgment upon the pleadings a court will disregard allegations that attempt to vary the terms of a written instrument the exact words of which have been pleaded and admitted. Thus in

*United States v. Ames,* 99 U. S. 35, 45, 25 L. ed. 295 (1879),

the Supreme Court said:

"Facts well pleaded are admitted by a demurrer; but it does not admit matters of inference or argument, nor does it admit the alleged construction of an instrument when the instrument itself is set forth in the record, in cases where the construction assumed is repugnant to its language. Authorities to that effect are numerous and decisive; nor can it be admitted that a demurrer can be held to work an admission that parol evidence is admissible to enlarge or contradict a sealed instrument which has become a matter of record in a judicial proceeding."

We are thus referred back to the terms of the agreement itself, as pleaded in the complaint and admitted in paragraph 1 of the answer. These disclose no basis for the contention that defendant's liability to pay ceased when he stopped using the name of Chalaire & Franklin. Therefore the plea of performance is bad.

**b. The plea of no consideration is a conclusion of law unsupported by any allegations of fact and contrary to the facts pleaded and admitted.**

This plea, as stated in the "First Separate and Distinct Defense" (Tr. pp. 16-17) is of course the barest conclusion of law. It therefore must stand or fall on the facts elsewhere pleaded and admitted and these show, we submit, an adequate consideration bargained for and received by the defendant.

The contract is in form unilateral.

See

I *Williston on Contracts* (1920), Sec. 102, p. 195.

The plaintiff did not, originally, promise anything. The defendant promised that *if* the plaintiff would not come back to China, he (the defendant) would pay the plaintiff 50,000 taels in the manner provided, after which the business should be his. There is of course no necessity that both parties to a contract should be bound by mutual promises from the outset. As Chief Justice Marshall said in

*Violett v. Patton,* 5 Cranch, 142, 150, 3 L. ed. 61 (1809),

"To constitute a consideration * * * it is sufficient that something valuable flows from the person to

whom'' the promise ''is made; and that the promise is the inducement to the transaction.''

The commonest sort of contract is that consisting of a promise given in exchange for an act,

*Anson on Contracts,* 2d Am. Ed., 1887, Part II, c. II, Sec. 4(a), p. 117,

and to refrain from doing what one has a legal right to do is just as good consideration as to do what one has a right to refrain from doing.

*Hamer v. Sidway,* 124 N. Y. 538, 27 N. E. 256 (1891);
I *Williston on Contracts* (1920), Sec. 102a, p. 198;
Contracts Restatement, Am. Law Inst., 1932, Sec. 75.

When one promises another in writing to pay for some act or forbearance to act which is to the promisor's benefit and the act is done or forborne by the promisee as stipulated, it is to be presumed that the promise was seriously made and that it was the inducement for the other party's performance.

*Williston,* op. cit., Sec. 102, p. 197.

Such, very evidently, was the defendant's understanding of the situation in this case, for when the plaintiff notified the defendant that he was not going to return to China, and did not return by January 1, 1928, the defendant commenced payment to plaintiff in the manner specified in the contract. It may be conceded that when the agreement was signed there was no consideration for the de-

fendant's undertaking, for the plaintiff retained the election whether or not to perform. The defendant's undertaking to pay 50,000 taels to plaintiff if he would not return was originally a mere offer, which might have been withdrawn perhaps even in November, 1927, when plaintiff notified defendant that he would not return to China. But when defendant, after receiving that notice, allowed the offer to stand, plaintiff's forbearance to return was an acceptance of the offer which caused it to become a binding contract on January 1, 1928. The plaintiff "did not return". That was the consideration for which the defendant had bargained and he received it.

The nature of the benefit to defendant is obvious—it gave him the opportunity to hold for himself the profitable legal business of which previously the plaintiff had had the larger share, and the record shows that the business did prove very lucrative to the defendant. The plaintiff's decision not to return to China, on the other hand, must be presumed to have been induced by his reliance upon the defendant's promise to pay a sum regarded by the parties as fair compensation to plaintiff for giving up to his partner the senior's share in their profitable practice. The essential consideration to defendant of course was that the plaintiff should not *practice law* in China, but that is included in the more comprehensive term "not return to China", and plaintiff in fact rendered not only substantial but literal performance.

We therefore submit that the plea of no consideration is bad.

c. **The plea of failure of consideration, like that of performance, depends upon allegations excluded by the parol evidence rule.**

This plea rests upon the allegations (Tr. p. 17) that if there was any consideration for the defendant's promise to pay "an important part of such consideration was plaintiff's promise to secure in the United States, lucrative legal business and send the same to the defendant in China", that plaintiff had not done so and thus a failure of consideration had resulted.

There is no such provision in the written contract. Clearly, therefore, this plea is barred by the parol evidence rule, under the authorities already cited in connection with the plea of performance, supra, pp. 36 to 37. A clearer case for the application of that rule could hardly be imagined. We therefore submit that the plea of failure of consideration is bad.

Only one other defense is pleaded in the answer.

d. **The plea of the statute of limitations is bad because the record shows that this action was brought within the period of six years allowed by the Consular Court Regulations.**

This has already been covered in the first part of the argument, dealing with the judgment of dismissal which in effect sustained this plea. We have shown that the applicable statute of limitations was Section 83 of the Consular Court Regulations which allows an action such as this upon a written contract, to be brought at any time within six years from the date when the cause of action accrued. The record shows that the plaintiff's cause of action accrued, we submit, April 30, 1930, and

by no possible theory earlier than April 1, 1928 (Tr. pp. 14, 16), that the action was originally filed February 1, 1934 (Tr. p. 2), less than six years thereafter, and the amended complaint (Tr. p. 12) states no new cause of action.

Therefore we submit that the plea of limitation is bad, that no issue has been raised by the answer and that the plaintiff's motion for judgment on the pleadings should have been granted.

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## V.

## *Conclusion.*

The judgment of the court below dismissing the plaintiff's complaint and awarding costs to the defendant should be reversed. The cause should be remanded with directions to enter judgment for plaintiff in the amount prayed for in the complaint, with interest thereon as prayed and with costs in both courts.

Respectfully submitted,

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